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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 71

H. C. JONES, Collector of Internal Revenue,
Petitioner,

VERSUS

THE LIBERTY GLASS COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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NOVEMBER, 1947.

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BRIEF FOR THE RESPONDENT

Opinions Below

The opinion of the District Court (R. 12-17) is reported in 66 Fed. Supp. 254. The opinion of the Circuit Court of Appeals (R. 20-23) and the dissenting opinion (R. 23-27) are reported in 159 Fed. (2d) 316.

Question Presented

The sole and only question presented in this case is whether the filing of respondent's claim for refund is gov-

erned by the two-year statute of limitations, as provided in Section 322 of the Internal Revenue Code, which governs "over-payment," or by the four-year statute, as provided in Section 3313 of the Internal Revenue Code, respondent's claim being for internal revenue tax "erroneously or illegally assessed or collected."

The question as presented on Page 2 of petitioner's brief is definitely not the real question and evades the real issue.

Statement

The material facts are set out in the agreed stipulation (R. 11-12) and are in substance as follows:

In March, 1939, the respondent filed its income tax return for the year 1938 and paid the amount shown thereon; in November, 1939, Thomas S. Depew, Internal Revenue Agent, made an examination of the books and assessed an additional tax in the sum of $158.53, which was paid; in November, 1940, Carl E. Latta, a revenue agent, made an additional examination of respondent's books and assessed an additional tax in the sum of $6,640.81, which was paid on March 8, 1941; in making the assessment last above mentioned, no consideration was given to respondent for retirement of indebtedness during the year 1938, and same resulted in an illegal tax against respondent in the sum of $1,053.49, which was erroneously and illegally assessed and collected; that claim therefor was filed on March 30, 1944, and was denied by the Commissioner of Internal Revenue on June 24, 1944, for the

sole reason that it was not filed within the proper time, and "The decision in the case of *U. S.* v. *Lederer Terminal Warehouse Company*, cited by you, is not being followed by the Bureau" (R. 9).

Complaint was filed in the District Court (R. 1-9). Answer and Motion to Dismiss was filed (R. 9-10). Opinion was filed (R. 12-17) and judgment entered (R. 17-18).

Appeal to the Circuit Court of Appeals for the Tenth District was perfected by the Government, and judgment of the District Court affirmed (Opinion, R. 20-23). Dissenting opinion by Justice Huxman (R. 23-27).

Summary of Argument

It is the respondent's contention that the judgment of the District Court and the Circuit Court of Appeals in this case is correct for the following reasons:

(1) That the provisions of Section 3313 and Section 322 of the Internal Revenue Code are clear and unambiguous, and clearly show that the claim is governed by Section 3313.

(2) That all of the District Courts and Circuit Courts of Appeals which have passed on the question here presented are unanimous in their opinion that the claim is governed by Section 3313.

(3) That Congress has approved the judicial interpretations made by the various District Courts and Circuit Courts of Appeals.

(4) That the Government through the Internal Revenue and Justice Departments acquiesced in the interpretation made by the various District Courts and Circuit Courts of Appeals for a period of approximately eight years.

(5) That the legislative history supports the conclusions reached by the District Court and Circuit Court of Appeals in this case, and many other District Courts and Circuit Courts of Appeals, although legislative history is not necessary or proper under the facts and conditions in this case.

(6) That all tax laws are construed in favor of the taxpayer, which is especially true in construing statutes of limitations.

ARGUMENT AND AUTHORITIES

We quote the two statutes above referred to:

Title 26, U.S.C., Section 322, Subsections (a) (1) and (b) (1) reads as follows:

"*(a) Authorization (1) Overpayment.* Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess profits tax, or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

"*(b) Limitation on Allowance. (1) Period of limitation.* Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer."

Title 26, U.S.C., Section 3313, reads as follows:

"All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any

sums alleged to have been excessive or in any manner wrongfully collected must, *except as otherwise provided by law in the case of income, war-profits, excess profits, estate, and gift taxes*, be presented to the Commissioner within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes), shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund" (Emphasis ours).

It is clear from a reading of the two statutes that the word "overpayment" used in Section 322 has a different meaning from the words "erroneously or illegally assessed or collected" used in Section 3313. As will be hereinafter shown, practically all courts have so held.

It is the chief contention of the Government that Section 322 includes all refunds of any kind or nature pertaining to income tax, war-profits, or excess-profits, and that the intention of the Congress in drafting Section 3313 was to entirely eliminate from that section anything pertaining to income and excess-profits tax. Certainly if that had been the intention, Congress would not have used the expression in Section 3313 "except as otherwise provided by law."

Had it been the intention to eliminate all of the provisions concerning these particular taxes, is it not reasonable to assume that Congress would have used an expression in substance as follows: "except that this section shall not affect in any way income, war-profits, excess-profits, estate, or gift taxes."

The language of the statute clearly indicates that Section 3313 will apply except as otherwise provided.

It is significant that Section 322 refers throughout to "overpayments." Not once is the word "collection" or the word "erroneous" or the word "illegal" used, while Section 3313 refers throughout to "collections," to assessments "erroneously or illegally" made, sums "wrongfully collected," so in the language of the statutes the distinction is clearly drawn between overpayments *and illegal collections.*

It is the contention of the Government that the word "overpayment" as used in Section 322 is exactly synonymous with the words "erroneously or illegally assessed or collected" as used in Section 3313 The argument goes to great length to show that there can be no possible distinction.

Is this argument logical? If any taxpayer would approach a tax collector and say, for example, "Last year I overpaid my taxes," and another would say, "Last year you erroneously and illegally assessed and collected a tax against me," everyone would agree that the two men were talking about an entirely different situation. One was a mere mistake in a legally assessed tax. The other was an unlawful and erroneous assessment made and collected. Materially different.

This contention is supported by the lower courts in this case. The opinion of the District Court states:

"As I view these statutes, there is no ambiguity presented here. The purpose of each of them is very clear.

Section 322 deals with claims for credits or refunds claimed to have been overpayment of any tax legally imposed, while Section 3313 deals with claims for credits or refunds claimed to have been paid *on sums alleged to have been erroneously or illegally assessed or collected, or claims for any sum alleged to have been excessive or in any manner wrongfully collected.* The statute (Section 3313) clarifies its intent by providing these words: 'except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes.' Clearly this must refer to Section 322 which provides a period of limitation on claims for *overpayment* on such taxes, of *three years* from the time the tax was paid. The claim of the plaintiff is for a sum alleged to have been erroneously or illegally assessed, and clearly is governed by the limitation so provided in Section 3313" (Emphasis the Court's) (R. 16).

The Circuit Court of Appeals, in affirming the District Court in this case, states as follows:

"By its express terms, Section 322 has application to claims for overpayment of income, war-profits, or excess-profits taxes. It was intended to govern overpayments resulting from errors occurring in the preparation of the return, or in other somewhat similar circumstances. And by its express language, Section 3313 has application to claims for the crediting or refunding of payments of internal revenue erroneously or illegally assessed. It was intended to govern where a deficiency assessment is erroneously or illegally made under pretended color of legal authority. The claim submitted by this taxpayer was not for a refund of an overpayment arising out of an error or mistake in the preparation of the return. Nothing of that kind entered into the situation. It was for money paid in liquidation of a deficiency assessment erroneously and illegally made under pretended color of legal authority. Therefore the time for the filing of the claim was fixed by Section 3313. *Huntley* v. *Southern Oregon Sales, Inc.*, 102 Fed. (2d) 538; *United States* v. *The Lederer*

Terminal Warehouse Co., 139 Fed. (2d) 679; *Pennsylvania Co. v. United States*, 152 Fed. (2d) 757, affirming 59 Fed. Supp. 667. See also *Olsen v. United States*, 32 Fed. Supp. 276; *Godfrey v. United States*, 61 Fed. Supp. 240; *Noble v. Kavanaugh*, 66 Fed. Supp. 258."

The other cases passing upon this matter seem to have all arrived at the same conclusion. In *Huntley v. Southern Oregon Sales, Inc.*, 102 Fed. (2d) 538, the court states: "This distinction had a logical basis." In *United States v. Lederer Terminal Warehouse Co.*, *supra*, the court found: "The distinction between the two statutes of limitations, Section 322 and Section 3313, is that the first mentioned is by its terms applicable to overpayment of income * * * while the latter section relates to internal revenue taxes erroneously or illegally assessed or collected." And also in the case of *Pennsylvania Company v. United States*, 59 Fed. Supp. 667, affirmed in 152 Fed. (2d) 757, the court says: "It seems clear, however, that the refund sought is not for an 'overpayment' in the sense used as the basis for the distinction drawn * * * All of these cases had under consideration the meaning of 'overpayment' as compared with 'erroneously or illegally assessed or collected,' as used in the statutes above quoted. All courts seem to hold that the words have a clear meaning, and need no investigation in addition to the reading of the statutes themselves.

It appears to be a settled rule that when words in a statute are sufficient in and of themselves to determine the purpose of the legislation, no outside investigation is needed.

In *United States* v. *American Trucking Association*, 310 U.S. 534, this Court held as follows:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. *When that meaning has led to absurd or futile results*, however, this Court has looked beyond the words to the purpose of the act" (P. 543) (Emphasis ours).

In support thereof this Court cites the following cases: *Taft* v. *Commissioner*, 304 U.S. 351, 359; *Helvering* v. *City Bank Co.*, 296 U.S. 85, 90; *Wilbur* v. *United States*, 284 U.S. 231, 237; *Crooks* v. *Harrelson*, 282 U.S. 55, 60; *U. S.* v. *Missouri Pacific R. Co.*, 278 U.S. 269, 278; *Caminetti* v. *United States*, 242 U.S. 470, 490; *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U.S. 184, 199; *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U.S. 315, 332; *Sorrells* v. *United States*, 287 U.S. 435, 446; *United States* v. *Ryan*, 284 U.S. 167, 176.

Attention is especially directed to the language in the case of *United States* v. *American Trucking Association*, *supra*, as follows:

> "When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the legislation."

This clearly states the unanimous holdings of this Court. It is only when the words of a statute lead to "absurd or futile results" that this Court or the lower courts should "look beyond the words" to determine the intent.

Surely no one would say that to grant a taxpayer four years within which to file a claim for refund instead of two years, leads to "absurd or futile results." The interpretation of these statutes by the various courts certainly is not "absurd or futile."

It is most interesting to note that the Department of Justice concurred. As late as 1945 able attorneys for the Government were of the opinion that Section 3313 was clear and unambiguous. These able attorneys were more positive on this point than the District Court or the Circuit Court of Appeals in the instant case.

In the brief of the United States, filed in the case of *In re: Tindle's Estate—Pennsylvania Company for Insurance on Lives* v. *United States*, 152 Fed. (2d) 757, then pending in the Circuit Court of Appeals, Third Circuit, it is stated on Page 10 as follows:

> "We submit that the decisions relied upon are not correct because Section 3313 of the Internal Revenue Code especially exempts from its application income tax, war-profits, excess-profits, estate and gift taxes. *The statute is clear and unambiguous; and resort to legislative history to aid it in its interpretation was improper. Helvering* v. *City Bank Co.*, 296 U.S. 85, 89" (Emphasis ours).

In the quoted statement, the Government's counsel were discussing cases that had approved the legislative history set out in the *Huntley* v. *Southern Oregon Sales Company case, supra*, which is much discussed by the Government and will be referred to later herein.

From 1939 to 1945, the Government's attorneys took the position that legislative history in this case was not only

unnecessary but was "improper." But when the case of *The Liberty Glass Company* was filed in 1946, it became the principal issue to be considered.

Section 322 provides for two things: First, there must be an overpayment; and second, the overpayment must be of a "tax imposed by this chapter" of the revenue laws; and similar provisions appear in corresponding sections of the revenue acts.

The second condition in Section 322 seems to have been entirely ignored by the Government's attorneys. It is evident that when Congress limited overpayments to "any tax imposed by this chapter" it intended to refer to a tax legally imposed and not to an erroneous or illegal assessment or collection.

It appears from the above that it would be unnecessary to give this matter further consideration. The fact that the Attorney General's office itself has taken absolutely divergent and contradictory positions on this subject is sufficient for this Court to give great weight to the unbiased and unprejudiced opinions of the District Courts and Circuit Courts of Appeals, which will be hereinafter referred to.

ALL CASES SUPPORT LOWER COURT'S DECISION

The Circuit Court of Appeals in this case made the following most significant statement:

> "Conceding that the cases just cited are against his contention and expressly challenging their correctness, it is the argument of the collector that by the exceptive

provision contained in Section 3313 a claim of this kind is excluded from that section. * * *" (R. 22).

The cases referred to by the Circuit Court are as follows:

Huntley v. *Southern Oregon Sales, Inc.*, 102 Fed. (2d) 538;
United States v. *The Lederer Terminal Warehouse Co.*, 139 Fed. (2d) 679;
Pennsylvania Co. v. *United States*, 152 Fed. (2d) 757, affirming 59 Fed. Supp. 667;
Olsen v. *United States*, 32 Fed. Supp. 276;
Godfrey v. *United States*, 61 Fed. Supp. 240;
Noble v. *Kavanaugh*, 66 Fed. Supp. 258 (E. D. Mich.), affirmed 169 Fed. (2d) 104 (C.C.A., 6th).

In addition, the following cases have been decided since that opinion was handed down and are to the same effect:

Noble v. *Kavanaugh*, 169 Fed. (2d) 104, (C.C.A., 6th);
Sbarbaro v. *United States* (ND Ill.), decided May 29, 1947, 1947 C.C.H., Par. 9284.

In *Huntley* v. *Southern Oregon Sales, Inc., supra*, the Court had before it the identical question here presented, with the sole exception that in that case the taxpayer was not required to file any return, and after an exhaustive review of the legislative history of the two Acts, the Court came to the conclusion that in overpayment of income tax the two-year statute applies, while in the case of taxes erroneously or illegally assessed or collected, the four-year statute applies, and then the Court states:

"The distinction made had a logical basis. It would take less time to discover errors in returns required to

be filed than it would to discover whether persons had correctly considered themselves exempt and not required to file returns at all. In the former case, the information was at hand, while in the latter it must be sought."

Here it plainly appears that the Court reached the same conclusion as did the District Court and the Circuit of Appeals in the instant case: that a distinction between *overpayment* of tax, and *illegally assessed or collected* tax is logical: that it is clear on its face: but in addition, this Court goes exhaustively into legislative history, on which the petitioner in this case alone relies, and finds that from this history it also clearly appears that Congress intended the distinction to be made.

In this *Huntley case* the Solicitor General of the United States formally announced that no petition for *certiorari* would be filed (*Prentice-Hall Federal Tax Service*, 1939, Vol. 1, Sec. 4.35).

The case of *Olsen* v. *United States*, *supra*, a California case decided March 19, 1940, comes to the same conclusion, and holds that the four-year statute and not the two-year statute governs. It will be observed that in this case a return was required which was not true in the *Huntley* v. *Southern Oregon Sales case*, and demonstrates the fallacy of the argument in appellant's brief that if the four-year statute should apply at all, it should apply only to cases where no returns are required, as was the fact in the *Huntley case*.

The case of *Godfrey* v. *United States*, *supra* (D.C., SD., NY., December 19, 1940), holds that the taxpayer's

claim for refund was not based on overpayment but was an erroneous and illegal assessment, and that the four-year statute of limitations under Section 3313 controlled.

In *United States* v. *Lederer Terminal Warehouse Company, supra* (C.C.A., 6th Circuit, November 30, 1943), the same conclusion was reached as in the other cases above cited. However, this case is in point with the case at Bar. In affirming the decision of the District Court, the Court said:

> "The conclusion which has been reached is in consonance with *Huntley* v. *Southern Oregon Sales, Inc.*, 9 Cir., 102 Fed.(2d) 538, wherein Judge Haney detailed legislative history pertinent here. See also *Olsen* v. *United States*, D.C. 32 Fed. Supp. 276. The fact that in the cited cases *no tax whatever* was due from the taxpayer while in the instant case *no additional tax* was due is deemed immaterial.
>
> "The distinction between the two statutes of limitation, Section 322 and Section 3313, is that the first mentioned is, by its terms, applicable to the *overpayment* of income, war-profits, or excess-profits taxes; while the latter section relates to internal revenue taxes *erroneously or illegally assessed or collected*, or to excessive payments or wrongful collections of all other taxes, except as otherwise provided by law in the matter of income, war-profits, excess-profits, estate and gift taxes. The essential distinction is that Section 322 relates to *mere overpayment*, while Section 3313 properly applies to *erroneous or illegal* assessment and collection.
>
> "If two statutes present ambiguities, a reasonable interpretation should be adopted by the courts which will give consistent effect to the apparent intention of Congress. Statutes should not be read literally when such reading leads to absurd results. They should be given a reasonable application consistent with their

words and with the legislative purpose.' *Haggar Company* v. *Helvering*, 308 U.S. 389, 394, 60 S. Ct. 337, 339, 84 L. ed. 540.

"Congress evidently considered that less time would be required for the discovery of errors in tax returns resultant from miscalculations or mere overpayment than would be required to ascertain the erroneous or illegal nature of an assessment. Hence, the inference is logical that Congress intended to allow the taxpayer a longer time to determine whether he had been erroneously or illegally assessed than would be permitted him for the discovery of a mere overpayment of taxes, assessed and collected upon a correct or legal basis. This would explain the longer time limitation provided by Congress in Section 3313 than that allowed in Section 322 of the Internal Revenue Code" (Emphasis the Court's).

We call special attention to the holding in this case:

"The fact that in the cases cited *no tax whatever* was due from the taxpayer, while in the instant case *no additional tax* was due is deemed immaterial" (Emphasis the Court's).

In the case of *Pennsylvania Company* v. *United States*, *supra*, the Court again holds that the four-year statute is applicable. In that case the Court said:

"It seems clear, however, that the refund sought is not for an 'overpayment' in the sense used as the basis for the distinction drawn, merely because plaintiff admittedly owed and paid some estate tax. The refund was rather for a refund sought to be imposed as an estate tax, but held by the Supreme Court not to have been levied at all under the statute in question, and *hence erroneously and illegally assessed*. The reasoning of the Circuit Court of Appeals for the Sixth Circuit in the excerpts from its opinion quoted above clearly brings the present claim under the general statute, Section 3228(a) of the Revised Statutes as Amended (I.R.C., 3313)."

> "I am inclined to follow the *unanimous* authorities bearing on this question and to hold that plaintiff's claim for refund, filed within four years from the time of the payment of the tax, was timely and permits the present action" (Emphasis ours).

Noble v. *Kavanaugh*, *supra* (D.C., E.D. So. Div., Mich.), involves the same question here presented. In the opinion the District Court pointed out:

> "Defendant has filed an exhaustive brief, containing among other things the legislative history of Sections 3313 and 322 in an attempt to show that the case of *U. S.* v. *Lederer Terminal Warehouse* as well as the other cases on which it relies, have been decided incorrectly."

Then apparently after a thorough consideration of the entire matter, he comes to the same conclusion as the District Court in the instant case. This case affirmed in 169 Fed. (2d) 104 (C.C.A., 6th).

Sbarbaro v. *United States* (N.D., Ill.), decided May 29, 1947, (1947 C.C.H., Par. 9284; also P.H. Federal Tax Service 72485), is a very recent case directly in point. In this case the Commissioner of Internal Revenue and the Department of Justice made the same contentions as here; that the decisions above mentioned in this brief are "unsound and should not be followed, since they are based on the erroneous assumption that 'overpayment' of tax and 'erroneously or illegally assessed and collected' taxes are not synonymous terms, and (1) would make an orderly, fair and equitable administration of the internal revenue laws impossible resulting in injustice, confusion and absurdities, (2) there is nothing in the legislative history of the per-

tinent provisions of the statute that reasonably may be said to indicate Congress intended that any but the ordinary and commonly understood meaning should be attributed to the terms employed. It is further contended by the Commissioner that Section 3313 is applicable only to Sub-title B relating to Miscellaneous Taxes and is different from that provided in Section 322 applicable to Sub-title A relating to income, estate and gift taxes since in the latter the taxes are subject to the jurisdiction of the Tax Court of the United States, whereas the former are not so subject" *(Prentice-Hall, 72,775)*.

It is quite apparent from the above that all of the contentions made here were made in that case in substantially, if not exactly, the same terms and in the same manner. No doubt the same exhaustive briefs were filed by the Government. Yet that court, applying reason and logic and following the uniform holding of all other courts, held as follows:

> "The two considered sections of the Act must be read in the light of their purpose for the convenience of government officials in passing upon claims and not entrap unwary taxpayers. The rule to be adopted should be a reasonable one and it seems to this court that the expression of the court in the *Lederer case* is one based on fairness and logic. This court follows the aforementioned authorities bearing on this question and holds that plaintiffs' claim for refund, based on an erroneous assessment and collection of income tax is filed within the period specified by Section 3313."

We are not informed as to whether or not this case has been appealed.

It was contended in the court below, and repeated in the Government's brief here, that the case of *Central Hanover Bank and Trust Company* v. *United States*, 67 Fed. Supp. 920 (S.D., N.Y.), and *Fawcett* v. *United States*, 70 Fed. Supp. 742 (N.D., Calif.), are *contra* to the holdings in the above case. An examination of those cases clearly discloses that this contention is erroneous.

In the case of *Central Hanover Bank and Trust Company* v. *United States* the court had under consideration overpayment of taxes caused by computation, and therefore under the plain provisions of the statute and all the decisions, would be controlled by Section 322. The court held that it did not come within the provisions of Section 3801 (the section being construed in that case) and therefore the taxpayer was entitled to recover.

Also this case was decided by the same court as the case of *Godfrey* v. *United States, supra*. It is clear that that court would not have overruled itself without making mention of the same.

The case of *Fawcett* v. *United States, supra*, is likewise in point, but it is indeed interesting because the court adopted "the rule" set out in the *Huntley* v. *Southern Oregon Sales case, supra*, on which the respondent here and all the courts rely, and which the Government's attorney contends is clearly wrong. We quote from that opinion:

> "The *Huntley case* is thus clear authority for *the rule* that where a tax statute provides a specific limitations period within which claims for refund of an overpayment can be filed, such limitations period is not applicable to a claim for refund of an illegally or er-

> roneously assessed tax. It would seem, however, to have no application to the instant situation since, by its very terms, the limitation period covering claims for refund of estate taxes is applicable only to those taxes 'alleged to have been erroneously or illegally assessed or collected.' It says nothing about 'overpayments' " (Emphasis ours).

This case goes further than others. It recognizes "the rule" in the *Huntley case* as established without question. This case, like all others, directly supports respondent's contention.

The only answer which the Government attempts to give for the well-considered cases of the various courts above referred to is that they all followed the case of *Huntley* v. *Southern Oregon Sales, supra*, and that no independent consideration or investigation was given, and therefore all of the cases are wrong.

Every one of the decisions cited was by unanimous opinion of the court, the only exception being the dissenting opinion of Justice Huxman in this case.

We find in the opinions that in most of the cases the courts themselves say that they have given due, careful, and independent consideration to the question.

In *Godfrey* v. *United States, supra*, the court says: "After careful consideration I have come to the conclusion" that the four-year and not the two-year statute applies.

In *United States* v. *Lederer Terminal Warehouse, supra*, the court says: "The conclusion which has been reached is in consonance with *Huntley* v. *Southern Oregon*

Sales," thus clearly stating that the court had made an independent investigation and had come to the same conclusion.

The Circuit Court of Appeals, in the instant case, states:

> "It is enough to say that we have examined it (legislative history) with care, and we do not think it necessarily supports the contention". (R. 22).

And in practically every other case we find statements of the court clearly indicating "careful consideration and examination with care."

In the instant case it seems that this Court will give extraordinary consideration to these decisions. The courts are scattered throughout the length and breadth of the United States—the Circuit Courts of Appeals of the Second, Sixth, Ninth and Tenth Circuits; the District Courts of California, Pennsylvania, South Dakota, New York, Illinois, Oklahoma, Michigan and Ohio. These courts practically cover the United States and represent the best legal ability, experience and thought in the United States outside of the Supreme Court of the United States itself.

Such decisions, backed by reason and common sense, will receive due consideration by this Court.

CONGRESSIONAL APPROVAL

The United States Circuit Court of Appeals very effectively pointed out that Congress had approved the interpretation of these statutes in the following language:

"Another well recognized rule lends its strength to the conclusion that the time for the filing of a claim of this kind is governed by Section 3313, not Section 332. The case of *Huntley* v. *Southern Oregon Sales, Inc., supra*, was decided almost eight years ago, and the later cases citing it with approval and reaching the same conclusion followed. During that period Congress convened from time to time, enacted revenue legislation, and by Section 5 of the Act of July 31, 1945; 59 Stat. 511, 523, amended Section 322, all without indicating in any manner its disapproval of the judicial interpretation placed upon the two sections. That, in composite effect should be regarded as congressional approval and adoption of the interpretation placed by the courts upon the two statutes. *Sessions* v. *Romadka*, 145 U. S. 29; *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U.S. 320; *United States* v. *Elgin, Joliet & Eastern Railway Co.*, 298 U. S. 492; *Missouri* v. *Ross*, 299 U. S. 72; *Electric Storage Battery Co.* v. *Shimadzu*, 307 U.S. 5. True, none of the cases construing the two sections was by the Supreme Court of the United States, but the rule of uniform judicial construction of a statute over a long period of time being regarded as acceptable to the legislative arm of the government has appropriate application where legislation dealing with the general subject matter has been enacted and the particular statute has been amended, without any action or expression indicating legislative disapproval of the judicial construction, even though the construction was by circuit courts of appeal and district courts of the United States. *Manhattan Properties, Inc.* v. *Irving Trust Co., supra.*"

In the brief of the Government, as well as in the dissenting opinion of Justice Huxman, there is an attempt to answer the above statement by simply stating that there was no showing in this case that Congress had any knowledge of the interpretation of the statute. Quoting from Justice Huxman:

"A decision by the Supreme Court is much more likely to come to the attention of Congress than a decision by a lower court" (R. 27).

Conceding the correctness of this statement, it materially loses its force when applied to the facts here, on which we have the decisions of eight district courts and five circuit courts of appeals, extending over a period of approximately eight years.

Approval of the Congress is shown by the majority opinion below, calling attention to the fact that Section 322 was amended by the Act of July 31, 1945. In addition, Congress has passed nine acts affecting income tax since 1939 and has in no way amended the statutes here involved, thus absolutely approving the interpretation that had been placed thereon.

GOVERNMENT ACQUIESCENCE

It appears that the action of the Internal Revenue Department and of the Justice Department of the United States in acquiescing so long in the decisions of the various circuit courts and district courts should have its proper weight here.

The circuit court of appeals in this case called attention to the fact that the principle for which the respondent here contends was decided by a United States District Court in the year 1939, almost eight years before this case was filed.

The Government, in its brief in the lower court, stated that in this case for the first time it presented its discus-

sion on legislative history. From 1939 to 1946 the Government had contended that legislative history had no place and was "improper."

In 1939 the Government had formally announced that no petition for *certiorari* had been filed in the case of *Huntley* v. *Southern Oregon Sales, supra* (*Prentice-Hall Federal Tax Service*, 1939, Vol. 1, 4.35). Later and in 1943 no petition for *certiorari* was filed in the more important case of *United States* v. *Lederer Terminal Warehouse Company, supra.*

In the case at bar the Commissioner announced that the "decision in the case of *U. S.* v. *Lederer Terminal Warehouse Company* cited by you is not followed by the Bureau" (R. 9).

Acquiescence by the Department of Justice and the Internal Revenue Department will be given consideration.

LEGISLATIVE HISTORY

From the above it would appear that investigation into legislative history is unnecessary if not "improper," as contended by the Department of Justice until 1945.

However, if this Court is to give consideration to the legislative history, we call specific attention to *Huntley* v. *Southern Oregon Sales, supra*, decided in 1939. There the court went into great detail concerning the legislative history of these two Acts, and came to the conclusion that the Congress of the United States intended that the refund of overpayment of a legally assessed income tax

should be governed by Section 322 and that the refund of an erroneously or illegally assessed or collected income tax was governed by Section 3313.

No one in the Department of Justice or the Internal Revenue Department questioned this exhaustive legislative history until the Liberty Glass Company filed this suit for $1,000 plus in the State of Oklahoma. After a most exhaustive investigation, the Justice Department comes to the conclusion that the court in that case was wrong, and for two reasons: (1) That the court failed to take into consideration a letter written by the Honorable Andrew Mellon, Secretary of the Treasury in 1923; and (2) that that court considered Seidman's Legislative History of Federal Income Tax Laws, which did not mention Andrew Mellon's letter.

There is nothing in the record to show that the court in the *Huntley case* did not consider Mr. Mellon's letter. It is true that his letter is not mentioned in the opinion, but from a careful reading of the letter itself, as contained in the brief of the Government, it clearly appears that it is not of sufficient importance to be considered. There is no evidence that the Congress followed it, except in principle. This letter clearly shows that Mr. Mellon was attempting to get the Government by legislation to ratify what he had done by rule and regulation and which was of questionable legality. The letter shows that the Secretary of the Treasury at that time was giving the taxpayer by rule four years to file his claim for refund after payment of illegal tax.

In the report to Congress, which the Committee of Ways and Means presented in 1923, together with a copy of the Mellon letter, one paragraph is as follows:

> "Where a tax has been paid under the provisions of Sections 221 or 237 in excess of that properly due, any refund or credit made under the provisions of this section *or Section 3228 of the Revised Statutes* shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent." (Emphasis ours.) (H. Rep. No. 1424, 67th Cong., 4th Sess., P. 2.)

The opinion of the Circuit Court of Appeals in 1939, which has been followed "after careful consideration" by the numerous courts above set out, coupled with Seidman's History of Federal Tax Legislation, should be given extraordinary weight.

This Court will give consideration to those who have investigated legislative history from an unprejudiced and unbiased standpoint.

STATUTE OF LIMITATIONS STRONGLY CONSTRUED IN FAVOR OF TAXPAYER

All tax laws are construed by the courts favorably to the taxpayer, and this principle is especially true when the law is a statute of limitations. Statutes of limitations are only statutes of expedience, and while it is recognized that they are important and necessary for the principal purpose of fairness to everyone concerned, and in order to expedite the administration of tax collection, yet it has always been the rule of this Court that whenever a doubt exists, it should be construed in favor of the taxpayer.

The Government admits that the tax was originally paid illegally, which makes the exhaustive and technical investigation of the Department of Justice difficult to understand.

The general rule that tax statutes should be construed in favor of the taxpayer is set out in *Allegheny Heating Co.* v. *Lewellyn*, 91 Fed. (2d) 280.

Also in *Gould* v. *Gould*, 245 U. S. 151, it is stated:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. *In case of doubt they are construed most strongly against the Government, and in favor of the citizen.*" (Emphasis ours.)

REPLY TO BRIEF OF THE PETITIONER

We received the very exhaustive brief of the Government in this case on the 29th day of October, 1947. The argument is divided into subheads lettered A, B, C, D, E and F. We will reply in that order.

A. OVERPAYMENT

Throughout the brief one of the chief arguments is the contention that "overpayment" as used in Section 322, means the same as "erroneously or illegally assessed or collected," as used in Section 3313. Examples are used to show what a ridiculous result would be had if overpayment did not include taxes "erroneously or illegally assessed and collected." It seems clear that overpayment

could mean the same as erroneously or illegally assessed or collected, but that is entirely beside the question. The question is: Does it mean the same when used in these sections?

To say that the word "overpayment" must mean the same under all conditions is almost as unreasonable as to say that the word "satisfied" should be construed as meaning the same under all conditions. For example, a man might say: "I am satisfied with my home life." Again the same man might properly say, "I am satisfied that my son is a bank robber." Yet under the argument, if the courts were presented with the responsibility of interpreting the word "satisfied," in both instances they must be interpreted to mean the same—a most unreasonable contention.

It is not the purpose in this case to determine what the word "overpayment" might include, in any other part of the law, nor what the word generally means, as stated by Justice Huxman in his dissenting opinion. Many words in the English language have a different meaning when used in a different way.

The question here is: Does the expression "overpayment of any (legal) tax imposed by this chapter" mean the same as a tax "erroneously or illegally assessed or collected?"

We think it is clear that the examples given in the Government's brief concerning the meaning of this word in the matter of appeals to the Tax Board, and the use of

this word in many other places in the statute, as well as its general meaning, become immaterial.

B. LEGISLATIVE HISTORY

The Government's brief presents a most exhaustive discussion of legislative history, which we have heretofore discussed. This same contention was made in the lower courts. We think our brief in chief is a sufficient reply.

C. ADMINSTRATIVE PRACTICE

Here is an attempt to show that the decision below is contrary to the "consistent, unambiguous, and long-established practice." Under this heading is cited a large number of cases decided by the Supreme Court of the United States and the district and circuit courts in a feeble attempt to show the construction of Section 322 has been "assumed without question."

Apparently neither the courts nor the attorneys on either side of any of the cases gave any thought to the question in the instant case.

Also numerous rulings of the Treasury Department made in 1922, 1923 and 1924, are cited. All of these rulings appear to be prior to the 1924 amendment of the statute on which the Government's brief relies. Any ruling prior to that time would have no effect; but it is evident that the courts in the *Huntley case* and all cases since that time were of the opinion that the Government was wrong, so any ruling of the Government would have little effect in this case.

If this matter is so material to administrative convenience and necessity, may we suggest that the Treasury Department should direct its attention to the clarification of the Statute of Limitations by the Congress, with a view to eliminating the alleged confusion. Such action would eliminate unnecessary litigation and lighten the burden of the courts, and would require less effort by the Justice and Revenue Departments.

D. OTHER SECTIONS AFFECTED

Here the contention is made concerning the effect of this interpretation upon other sections of the statute. This matter we have heretofore discussed in this brief. We repeat that a decision in this case will not determine what the word "overpayment" might mean generally or in other places in the revenue laws.

E. LOWER COURT CASES

Only six pages is devoted to the discussion of the numerous cases heretofore decided by all of the district courts and circuit courts of appeals, which we have heretofore discussed in this brief. The argument effectively shows that "Everybody is out of step" except the Justice and Revenue Departments.

F. LEGISLATIVE ACQUIESCENCE

Here is an attempt to minimize the importance of legislative approval, which we have heretofore discussed in connection with the findings of the Circuit Court of Appeals in the instant case.

INTEREST

Interest on claims for refund is discussed on Page 38 of petitioner's brief. This is not proper in this case for three reasons:

(1) It was agreed that if respondent prevailed, it would be entitled to "interest as provided by law" (R. 12).

(2) The argument is a repudiation of the contention that "overpayment" must be construed as meaning exactly the same no matter how used in all of the revenue laws.

(3) The courts have decided the question.

In *Sbarbaro* v. *United States, supra,* it is stated:

"There remains the question of interest on said claim for refund. * * * The key word in the sentence is 'overpayment' and defendant states that since plaintiffs have insisted upon a distinction between that term as used in Section 322 and that of 'erroneously and illegally assessed or collected' under Section 3313, they are also bound to that interpretation so far as the term 'overpayment' in the interest section is concerned. However, it appears that plaintiffs were not indulging in a literal construction of 'overpayment' since judicial interpretation and legislative intent have given the definition that which they attribute to it. *The definition of any statutory term is conditioned by the intent with which the term is used within the section.*" (Emphasis ours.)

CONCLUSION

The decision below is based upon law, reason and justice, and is supported by the decisions of all of the courts

to which the question has been presented. It should be by this Court affirmed.

Respectfully submitted,

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NOVEMBER, 1947.